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Supreme Court of the United States.

October Term, 1904. No. 477.

BERTHA DOCTOR AND KATHARINE SAYLES,

Appellants,

against

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY, AND SAYLES ZAHN COMPANY,

Appellees.

Brief and Argument for Appellees.

GEORGE H. YEAMAN,

Of Counsel for Appellees.

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BRIEF AND ARGUMENT FOR APPELLEES.

The legal question certified to this Court is whether the complainants' bill showed such diversity of citizenship between the parties complainant and parties defendant as would confer jurisdiction upon the Court below.

The complainants allege that they are citizens of the State of New Jersey and owners of shares of the stock of the Sol Sayles Company; that the defendants, John J. Harrington and Dennis A. Harrington, are citizens of New York, and that the Sol Sayles Company and the Sayles Zahn Company are

corporations created under the laws of New York and are citizens of New York.

The bill then proceeds to state certain alleged wrongful acts on the part of John J. and Dennis A. Harrington, and the Sayles Zahn Company, by which the Sol Sayles Company suffered great pecuniary loss and damage.

The facts alleged need not be repeated in detail here, because counsel for appellants, in his brief, frankly and properly admits that the cause of action stated is derivative (Brief, p. 7), that the action is for the benefit of the Sol Sayles Company, that they "are seeking to maintain this action in the right of the Sol Sayles Company" (Brief, p. 10). The brief further admits "that unless relief could be afforded to that corporation, had it instituted this action, the complainants would have no standing in Court." (Brief, p. 7.)

If counsel for appellees could believe that this statement was deliberately penned with reference to the sole question of *jurisdiction* now under consideration, they would not deem any argument for appellees necessary; for very clearly the Sol Sayles Company could have obtained no relief had it instituted *this action*. But as the statement was probably intended to refer to a recovery on the *merits* by the Sol Sayles Company on the same cause of action in a Court of *competent jurisdiction*, it is only proper to accept it as being, that far, a correct statement of the law.

We submit the following points in argument:

I.

THE MEMBERS AND STOCKHOLDERS OF A CORPORATION ARE INDISPUTABLY PRESUMED, IN A CASE AS THE ONE AT BAR, TO BE CITIZENS OF THE STATE, UNDER WHOSE LAWS THE CORPORATION WAS ORGANIZED.

The plaintiffs allege themselves to be stockholders of the Sol Sayles Company, a corporation created and organized under the laws of New York and a citizen of New York. Stockholders, members of a corporation, are conclusively presumed to be citizens of the State which created the corporation, called it into life, gave to it its being as an artificial, legal entity.

> *Thomas vs. Board of Trustees of Ohio State University.* (No. 43. October Term, 1904, and cases cited.)

By this plea of a New Jersey residence, complainants seem to have sought to execute a somewhat clever move in their game of litigation by which they might transfer themselves and their cause of action from the State Courts, where they rightfully belong, into the United States Courts, where they do not belong and where they have no proper standing.

In the attempt so to do, however, they are met by the presumption of law which the courts have repeatedly declared to be irrebuttable and indisputable, viz.: That the members of a corporation, *i. e.*, its stockholders, must be regarded as citizens of the same State as the corporation itself.

This presumption is sustained by abundant authority of a character and long standing not now to be successfully challenged. See

Louisville, etc., R. R. Co. v. Letson, 2 How. U. S., 497, 558;

St. Louis & San Francisco Ry. Co. v. James, 161 U. S., 545;

Barrow S. S. Co. v. Kane, 170 U. S., 100;

Southern Ry. Co. v. Allison, 190 U. S., 326;

Carter on the Jurisdiction of the Federal Courts as limited by the Citizenship and Residence of the parties at p. 197.

Covington Drawbridge Co. v. Shepherd, 20 How., at p. 232.

Muller v. Dows, 94 U. S., 444;

Foster on Fed. Pr., Vol. 1, Sec. 19.

It is contended on behalf of appellants that this presumption has been raised and acted upon merely so far as it affects jurisdiction *over corporations*, as distinguished from their members; and that it cannot, and was not intended to be applied to the citizenship *in fact*, of such members or stockholders. There may be cases in which a stockholder, citizen of one State, has sued his corporations, a citizen of another State, in the Courts of the United States, cases in which jurisdiction depended on diversity of citizenship. But the question was not raised. It passed *sub silentio*.

The presumption that stockholders are citizens of the State which created their corporation is the foundation of the presumption that the corporation is a citizen of that State, a conclusion which gives it a status as a citizen for jurisdictional purposes. It is impossible that an artificial legal entity can be a citizen in any other sense. The presumption

having been established to avoid infinite confusion and absurdity in questions of jurisdiction, ought to support not only the citizenship of the corporation, but, for the same jurisdictional purposes should equally support the co-citizenship of the corporation and the individual, natural persons who are the component members, the stockholders of the corporation, the legal entity.

In *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545 (40 L. Ed. 802), this Court was asked to rule that, having held a corporation to be a citizen of the State creating it, the Court should go further and hold that when that corporation is authorized by the law of another State to do business therein, and for that purpose to be endowed with all the powers and privileges of a domestic corporation, it should be deemed a citizen of that other State also. But the Court refused to extend the rule so far. Manifestly such an extension would create about as much confusion, absurdity and injustice as was avoided by the rule as originally adopted.

We do not suggest that the Court should hold that, because, for jurisdictional purposes, corporators are now held to be citizens of the same State with their corporation, therefore they should be held to be such for all purposes, even in contests with other corporations or with private persons. To say nothing of constitutional difficulties, the inconvenience, injustice and absurdity would be as great as those which were removed and overcome by the original presumption. But we do insist that not merely logical consistency, but the substantial reason of the thing requires that the rule should apply to and govern the relations between a corporation and its constituent members in cases like

the one at bar. What more appropriate tribunals exist, either for punishing corporations or protecting their rights than the Courts of the States which have created them? The rule now contended for would cut up by the roots the abuses so trenchantly described in the Contra Costa (Oakland) Water Co. case. (14 Otto, 450.)

In *Thomas vs. Board of Trustees of Ohio State University*, the Court says: "For the purpose of *suing* and being sued in a Circuit Court of the United States the *members* of a local corporation are *conclusively presumed* to be citizens of the State by whose laws it was created and in which alone the corporate body has a legal existence."

This is broader than the usual statement that for the purpose of jurisdiction a corporation will be conclusively presumed to be a citizen of the State by whose laws it was created. The presumption as stated in Thomas v. Trustees is a necessary and indispensable premise upon which to base the deduced presumption of the citizenship of the corporation itself, and the rule, as there stated, would give full reciprocal action to the reasoning on which the presumption is based. It thus extends, and only extends, to the legal relations between the company and its members in cases like this. It would not interfere with the general rights and privileges incident to citizenship.

II.

IF THE PRESUMPTION OF CITIZENSHIP DISCUSSED IN THE FOREGOING POINT BE HELD REBUTTABLE, BY AVERMENT AND PROOF TO THE CONTRARY, THEN, NO MATTER HOW THE PLEADER HAS ARRANGED THE PARTIES, THE COURT WILL ALIGN THEM ACCORDING TO THEIR REAL RIGHTS AND INTERESTS, TO ASCERTAIN WHETHER THE REAL CONTROVERSY IS BETWEEN CITIZENS OF DIFFERENT STATES.

A stockholder's suit may be brought against the stockholder's company and other persons or corporations, to restrain doing an act that would result in direct and not consequential injury *to the stockholder*. In such a case, the corporation has no right of action, no damage has been done to it, and it could not sue. And so a stockholder's suit may be brought against the corporation and other parties to prevent the doing an act that would result in a forfeiture of the corporation's franchise. The company could not sue itself to prevent itself from becoming *felo de se*. Yet such an act would be an injury to the stockholder. It is believed that Rule 94 does not apply to such cases.

Whether, in such cases, the allegation of actual diversity of citizenship would sustain jurisdiction, or the presumption of co-citizenship of a corporation and its members would overcome the allegation and defeat jurisdiction, is a question not now before the Court.

The case of Utah-Nevada Co. vs. De Lamar, 133 Fed. Rep., 113, holds that in such a case the presumption does not apply. The case is clearly distinguishable from the one at bar because the suit was upon a cause of action vested in the plaintiff by contract, and had no relation whatever to the *class of actions we are now* considering (pp. 113-114). Moreover, the judgment of the Circuit Court, to which the case had been removed, was reversed upon the ground that that Court had no jurisdiction because the plaintiffs' assignor Blake could not have sued in the Circuit Court (p. 119 et seq), and the Circuit Court was ordered to remand the case to the State Court (p. 124). Therefore, the observations touching the presumption of citizenship may be regarded as obiter.

The case of Hanchett vs. Blair, 100 Fed. Rep., 817, was clearly a direct controversy on a contract between the plaintiff, a stockholder, and his corporation (p. 818-819), and has no relation whatever to the class of cases to which the one now under review belongs.

In other cases, the more common state of facts, third parties are charged with committing acts injurious to the corporation, such as negligently or intentionally wasting or misappropriating its assets. For the purposes of such an action, the corporation is one person, and its officers, trustees or directors are third persons. In all such cases the presumption of co-citizenship should be inexorably applied. Every reason that can be urged for presuming a corporation to be a citizen of the State under whose laws it was created, applies with full force in cases like the one now under review to the citizenship of the members of the corporation.

Other reasons may be named. The *property right* is in the corporation. The *right of action* is in the corporation. The action is for the *benefit* of the corporation. The plaintiff, as a mere stockholder, has less to commend his appeal to the Circuit Court than the assignee of a chose in action has, and he is *expressly excluded*, unless his assignor could have sued. The application of the presumption would entirely remedy the evil and the *frauds on jurisdiction* which led to the adoption of Rule 94.

When such acts have been committed, the right of action vests in the corporation. It is the party primarily entitled to sue. A stockholder has no right of action whatever, in such a case, until his corporation, upon his request, has refused to sue. It is that refusal which gives him the right to go into equity, although the nature of the wrong done would have supported only an action at law by the injured corporation. His right of action is derivative. But the corporation is a necessary party, the suit must be brought for its benefit, and it thus becomes substantially a plaintiff in the case. The stockholder who brings the action would not be allowed to receive a dollar of the money if the bill asked for damages, or for an accounting. The recovery becomes assets of the corporation. Whether *officers*, guilty of participating in the wrong, would be allowed, *as stockholders*, to participate in the distribution of the recovery, has not been decided by this Court, and the question is not now before it.

To maintain such an action in a Circuit Court of the United States, the necessary diversity of citizenship must exist. To ascertain whether such diversity exists, the Court will always align parties according to their interests—according to the substance of the controversy.

When jurisdiction fails, it is the duty of the Court of its own motion, to dismiss.

In *New v. Oklahoma*, decided at October Term, 1904, No. 226, the opinion of the Court concludes with the following statement:

> "Reference is made to Queenan v. Okla-
> "homa 190 U. S. 548 (47 L. Ed. 1175), in
> "which we entertained jurisdiction in the
> "absence of any suggestion as to the want of
> "it."

"*United States v. Simms*, 1 Cranch. 252 (2d L. Ed. 98), is an instance of similar inadvertence, and when cited in *United States v. More*, 3d Cranch. 159, 172, 2d L. Ed. 397, 401, Chief Justice Marshal disposes of it in these words:"

> "No question was made in that case as to
> "the jurisdiction. It passed *sub silentio* and
> "the Court does not consider itself as bound
> "by that case."

In the case at bar the bill, in form, alleges diverse citizenship. But the U. S. Courts have firmly established the policy of looking at the facts to see how the parties are interested, and will align them as plaintiffs or defendants according to that interest or according to the substance of the controversy. This is made a duty under the 5th clause of the Act of 1875. Guided by that rule, there is no difficulty in assigning the New York corporation its proper position on the record, for the purpose of determining the question of jurisdiction. It is the real plaintiff in the action, and is a citizen of the same State with the other defendants.

A short and decisive test in the case at bar is:

Could the Sol Sayles Company have maintained its bill in the same Court on the same cause of action? The inevitable answer is in the negative. The cause of action vested and remains in that company. That company and all the other defendants are alleged by the bill to be citizens of New York. No diversity of citizenship exists as between them. Even in a State Court the action would not be upon any legal right of the plaintiffs. They have none. It would be derivative—based solely upon the fact that the corporation would not sue. But a derivative action must not be allowed to override the inexorable rule of diversity of citizenship as an indispensable requisite to jurisdiction in the Courts of the United States. If the presumption of the co-citizenship of a corporation and its constituent members may be rebutted by averment and proof to the contrary, yet the duty and the power of the Court to align parties according to the facts, according to the substance of the controversy, remains, and the alignment in this case at once places the Sol Sayles Company as plaintiff. The corporation being a citizen of New York, the jurisdiction fails. The corporation is a necessary party. The Court could not proceed without its presence. The suit is for its benefit, and *benefit, interest in the litigation*, is the test in aligning parties.

This conclusion, if not actually required by the language of the statute, is certainly required by its policy and spirit.

> "Nor shall any Circuit Court have cogni-
> "zance of any suit, except upon foreign bills
> "of exchange, to recover the contents of any
> "promissory note or other chose in action
> "in favor of any assignee * * * unless such

> "suit might have been prosecuted in such
> "Court to recover the said contents if no as-
> "signment or transfer had been made."

The plaintiffs occupy a much less favorable position than would an assignee of the Sol Sayles Company. Such an assignee *would hold the legal title*, yet could not sue in the Court in which this suit was brought. The plaintiffs, as mere stockholders, have no title whatever in the assets of the corporation. They assume to enforce its rights, by appealing to a Court that is closed against the company. The State Courts are open to the plaintiffs and to their company. The case well illustrates the evils so forcibly depicted in the Contra Costa (Oakland) case, and illustrates the benefits that would follow the application of the presumption contended for in Point I.

In *St. Louis &c. Railway Co. v. Davis and others*, 132 Fed. Rep., p. 629, the Court, at page 632, says:

> "In determining questions of jurisdiction
> "of the National Courts, there are several
> "well settled rules to govern the Courts.
> "The Act March 3d, 1887, as corrected by
> "Act March 13, 1888, was intended to contract
> "the jurisdiction of the National Courts, and
> "all doubts as to jurisdiction must be re-
> "solved against it."

In *Greel v. United Electric Co.*, 132 Fed. Rep., 252, a removal cause, Judge Lanning has extensively reviewed many of the cases which throw any light upon this subject and concluded by remanding the case to the State Court in which the action had been instituted.

At page 254, the Court says:

> "The New Jersey Company (the plaintiff's "corporation), in the case now under con- "sideration, cannot be considered a merely "formal or immaterial party. It is a neces- "sary and indispensable party—the case "could not proceed without it. The com- "plainant seeks relief in its behalf because "it will not seek it for itself. As it will not "voluntarily act as complainant, the practice "in equity requires that it shall be brought "in as a party defendant. It follows that in "determining the question of jurisdiction, its "citizenship cannot be ignored. But the "mere fact that it stands as a defendant on "the face of the pleadings does not fix its "status in the controversy. That is fixed by "its real relation to the controversy."

The case at bar could not proceed without the presence of the Sol Sayles Company. The complainant seeks relief in its behalf because it will not seek it for itself.

But it is submitted that in the review of the cases the learned Judge was not quite accurate in citing *Dodge v. Woolsey*, 18th How. 331, as a case in which such jurisdiction has been maintained.

The jurisdiction was contested in that case on the contention that Courts of equity as such had no jurisdiction over corporations, which seems at one time to have been a serious question, and upon the further ground that the suit had been improperly brought in the Circuit Court of the United States for the District of Ohio, because it was a contrivance to create a jurisdiction where none fairly existed by substituting an individual stockholder instead of the bank as complainant and making the directors defendants, the stockholder being made complain-

ant because he was a citizen of the State of Connecticut. Upon that branch of the case, the Court remarked:

> "As to the imputation of contrivance, "that is the assertion of a fact which does "not appear in the case, one which the de- "fendants should have proved if they meant "to rely upon it to defeat the complainant's "suit, and not having done so, as they might "have attempted to do, we cannot presume "its existence."

That neither states nor decides the precise question now under consideration. And if it had done so, yet the Circuit Court, in the Groel case, was quite correct in the statement that Dodge v. Wolsey was decided long before the enactment of the statute of 1875. Under Section 5 of that Act, the Court must look behind the place assigned to parties by the pleader and inquire whether such a suit really and substantially involves a dispute or controversy properly within the jurisdiction of the Circuit Court, and, if it does not, must dismiss the suit or, if it has been removed to the Circuit Court, shall remand it to the State Court in which it was commenced.

In the Groel case, the Court states, as one of its conclusions:

> "The rule deduced from them (the author- "ities) is that in a suit in equity instituted "by a stockholder in his own name, but upon "a right of action existing in his corporation, "the stockholder's corporation will be "aligned with the defendants whenever the "officers or persons controlling the corpora- "tion are shown to be opposed to the object "sought by the company's stockholder, and

> "that when such opposition does not appear "the stockholder's corporation will be "aligned with the complainant in the suit." pp. 263-264.

It is submitted that the rule is not fully stated. The stockholder and his corporation must be aligned on the same side whenever it appears, either from the pleadings or the facts proved, that their interests are substantially the same, or that the managers of the corporation are really in sympathy with the stockholder, *or that the corporation will be benefited by the stockholder's success.* In deciding such a question, the fact that the corporation has refused to sue is of no consequence whatever. As pointed out by the Supreme Court, that is often a device to get jurisdiction. The true rule was well stated in *Elkins v. City of Chicago*, 119 Fed. Rep. 957-958 as follows:

> "It is the duty of the Court, for jurisdic- "tional purposes, to ascertain the necessary "parties to the suit and align them upon the "one side or the other in conformity with "their own interests and attitudes, irrespec- "tive of their designations in the bill."

In *Hawes v. Contra Costa Water Co.*, 104 U. S. 450 (26 L. Ed. 827), the Supreme Court went largely into the history of these stockholders' suits, a multiplicity of which had arisen after the decision in Dodge v. Wolsey, 18 How. 331, saying:

> "This practice has grown until the corpor- "tions created by the laws of States bring a "large part of their controversies with their "neighbors and fellow citizens into the "Courts of the United States for adjudica- "tion, instead of the State Courts, which are

"their natural, their lawful and their appro-
"priate forum. It is not difficult to see how
"this has come to pass. A corporation hav-
"ing such a controversy, which it is foreseen
"must end in litigation, and preferring for
"any reason whatever that this litigation
"shall take place in a Federal Court, in
"which it can neither sue its real antagonist
"nor be sued by it, has recourse to a holder
"of one of its shares, who is a citizen of an-
"other State. This stockholder is called into
"consultation and told that his corporation
"has rights which the directors refuse to en-
"force or to protect. He instantly demands
"of them to do their duty in this regard,
"which, of course, they fail or refuse to do,
"and thereupon he discovers that he has two
"causes of action entitling him to equitable
"relief in a Court of Chancery, namely: one
"against his own company, of which he is a
"corporator, for refusing to do what he has
"requested them to do; and the other against
"the party which contests the matter in con-
"troversy with that corporation. These two
"causes of action he combines in an equity
"suit in the Circuit Court of the United
"States, because he is a citizen of a different
"State, though the real parties to the con-
"troversy could have no standing in that
"Court. If no non-resident stockholder ex-
"ists, a transfer of a few shares is made to
"some citizen of another State, who then
"brings the suit. The real defendant in this
"action may be quite as willing to have the
"case tried in the Federal Court as the cor-
"poration, and its stockholder. If so, he
"makes no objection, and the case proceeds
"to a hearing. Or he may file his answer de-
"nying the special grounds set up in the bill
"as a reason for the stockholders' inter-
"ference, at the same time that he answers to

"the merits. In either event, the whole case "is prepared for hearing on the merits, the "right of the stockholder to a standing in "equity received but little attention, and the "overburdened courts of the United States "have this additional important litigation "imposed upon them by a simulated and con-"ventional arrangement, unauthorized by "the facts of the case or by the sound princi-"ples of equity jurisdiction."

The Court, referring to the Statute of 1875, says:

"And this same statute, while enlarging "the jurisdiction of the Circuit Courts in "cases fairly within the constitutional grant "of power to the Federal Judiciary, strikes a "blow, by its fifth section, at improper and col-"lusive attempts to impose upon those courts "a cognizance of cases not justly belonging "to them. It declares, if at any time in the "progress of the case either originally com-"menced in a Circuit Court or removed there "from a State Court, it shall appear to said "Court that such suit does not really involve "a dispute or controversy properly within "the jurisdiction of said Court, or that the "parties to said suit have been improperly "or collusively made or joined, either as "plaintiffs or defendants, for the purpose of "creating a case cognizable or removable "under this act, the said Circuit Court shall "proceed no further, but shall dismiss the "suit or remand it to the Court from which it "was removed."

Touching the steps to be taken in such a case to give the plaintiff a standing in a Court of Equity, the Court says:

"He must make an earnest, not a simu-

> "lated effort with the managing body of the "corporation to induce a remedial action on "their part, and this must be made apparent "to the Court. If time permits or has per- "mitted, he must show, if he failed with the "directors, that he has made an honest effort "to obtain action by the stockholders as a "body in the matter of which he complains, "and he must show a case, if this is not done, "where it could not be done or it was not "reasonable to require it."

That was before the rule was adopted. Almost immediately after handing down the decision in the Hawes case, the Supreme Court formulated and published the ninety-fourth rule in equity.

In *City of Quincy v. Steel*, 120 U. S. p. 241 (30 L. Ed. 624), the plaintiff, who was a citizen of Alabama, brought his bill against the City of Quincy, a municipal corporation of the State of Illinois, and the Quincy Gas, Light & Coke Company, a corporation of that State. The Court said:

> "We are of opinion that the demurrer of "the City of Quincy should have been sus- "tained for the reason that Mr. Steel shows "no sufficient ground why he should have "been permitted as a stockholder of the Gas "Company to sustain this bill. In order to "do this the circumstances must be such as "to justify the Court in the interest of justice "to override two cardinal principles of fed- "eral jurisprudence—one of these is that the "litigants in the Federal Courts, where the "right to sustain such litigation depends "upon the citizenship of the parties, shall be "citizens of different States. In this case, "the real right of action and the real con- "test before the Court, if it had proceeded,

> "would have been between two corporations "organized under the laws of Illinois and "existing and doing business in the same "place, to wit: the Gas Company and the "City of Quincy."

Central Railroad Co. v. Mills, 113 U. S. 249, 49 Law Ed. 949, was a removal case, but, of course, the question of jurisdiction is the same. The Court said:

> "The controversy in this case is not be- "tween citizens of different States. In truth "as well as in fact the parties on one side of "the controversy are citizens of New Jersey "and those on the other side of the contro- "versy are a New Jersey Corporation and "other citizens of New Jersey as well as a "Pennsylvanian corporation and citizens of "Pennsylvania and of Maryland. The bill is "filed by stockholders in the New Jersey cor- "poration in behalf of themselves and other "stockholders similarly situated to set aside "a lease made by that corporation acting in "concert with the other defendants, of its "railroad and property, in excess of its cor- "porate powers, and in fraud of the right of "the plaintiffs. All the defendants united in "defending the acts complained of against "them. The New Jersey corporation is in "no sense a merely formal party to the suit "or a party in the same interest with the "plaintiffs, but is rightly and necessarily "made a defendant."

The decree of the Circuit Court remanding the case to the State Court was confirmed.

In *East Tennessee Rr. Co. v. Grayson*, 119 U. S. 240 (30 L. Ed. 382), also a removal case in which the decree of the Circuit Court remanding the case

was affirmed, the Court cited the foregoing case with approval.

In *De Neufville v. New York, &c.* (81st Fed. Rep., p. 10), a bill was filed in the Circuit Court, a demurrer was filed, the demurrer sustained, and, on appeal to the Circuit Court of Appeals, the decree was reversed. Several questions were involved, upon some of which the judgment had to be reversed, no matter what might be the view of the Court upon the question here discussed. Therefore the remarks on that subject were obiter. The Court, in a *per curiam* opinion, said:

> "But in whatever form or under whatever "name it is presented, it is the cause of ac- "tion of the corporation, and of the corpor- "ation alone. The real controversy is be- "tween the corporation, whose officers refuse "to assert its rights, and the alleged conspir- "ators, who have deprived it of its property. "If the wholesome rule approved by the Su- "preme Court in numerous decisions were "followed, and the parties arranged, not as "they stand in the title, but according to "their interest in the controversy, we would "have the New York & Northern Railway "Company classified as a plaintiff, and the "diversity of citizenship necessary to confer "jurisdiction would no longer exist. If the "Circuit Courts were entirely free to enforce "the provisions of the fifth section of the act "of 1875 to every case where it logically ap- "plies, they would no doubt be able to relieve "their dockets, as was suggested in Hawes v. "Oakland, 104 U. S. 450, of many cases "which have no proper place there; but the "decisions in Dodge v. Wolsey, 18 How. 331, "Hawes v. Oakland, supra, and Quincy v. "Steel, 120 U. S., 241, 7 Sup. Ct. 520, and the

> "ninety-fourth rule in equity seem to pre-
> "clude a strict application, in cases such as
> "the one at bar, of the rule that parties may
> "be rearranged according to interest in the
> "controversy."

If we understand this correctly, the learned Court expressed an opinion against the jurisdiction of the Court below, but proceeded to intimate an opinion that the cases cited preclude a strict application in that case of the rule that parties may be rearranged according to interest in the controversy. With the utmost deference to a Court of so much learning and authority, we beg to submit that the cases of Hawes v. Oakland and Quincy v. Steel have been misapplied, while as to the case of Dodge v. Wolsey, it may be said, with entire correctness, that the precise question here presented was not raised in that case, and that the case was decided long before the enactment of the statute of 1875, which makes it the duty of the Court to align parties in a controversy according to their interest in it, and to dismiss the suit if the Court finds that it has no jurisdiction over the parties as thus aligned. And, as to the 94th Rule in equity, so far from precluding a strict application of the policy of rearranging parties according to interest in the controversy, it favors such alignment. That rule did not enlarge jurisdiction and it could not. The Courts of the United States are tribunals of constitutional and statutory jurisdiction. This Court cannot confer or enlarge the jurisdiction of the Circuit Courts by promulgating a rule of pleading, and did not attempt to do so. They exercise only such as has been granted. They may establish rules of practice, and Rule 94, so far as it has any effect

upon procedure in the United States Courts, is a rule of limitation instead of enlargement. Compliance with that rule may, in some cases, assist the Court to determine the proper attitude of parties with relation to their interest in the controversy; and yet compliance with it is not conclusive, as the Court will determine the question of interest and alignment from all the facts in the case; and, as enforcement of that rule tends to diminish rather than to multiply the cases to be heard by the Courts of the United States, it is difficult to perceive how it could have been thought that the rule was any impediment to the application of that other rule that parties will be arranged according to their interest in the controversy. Even when compliance with the rule is sufficiently alleged in the bill, the Court may determine, from all the allegations of the bill, whether jurisdiction over the real controversy is supported by diverse citizenship. Allegation of compliance with the rule may be denied and disproved, and then jurisdiction fails. It has no application except to cases over which the Court can otherwise take jurisdiction. It will not for a moment bear the construction that it confers or widens jurisdiction. Alignment may take place after the evidence is in as well as on the face of the complaint.

The learned counsel for appellants contends that the Court, in making the rule, conceded the jurisdiction in such cases. The rule only expresses what is the practice in many Courts of equity, without any formulation of a rule of Court on the subject. The only change made was in requiring *oath* to be made that "the suit is not a collusive one to confer upon a Court in the United States jurisdiction of a

case of which it would not otherwise have cognizance." It could as well be contended that when that allegation appears the Court must hold the bill a good one without regard to the equity of the bill, and without regard to diverse citizenship. This Court does not adjudge cases in advance on mere formal compliance with a rule of practice. It adjudges causes which come before it in due course of litigation. The simple truth is that the rule has, to a large extent, failed to accomplish the object intended. Verifying pleadings by oath has come to be almost a matter of mere form. It is a very rare occurrence that a litigant's conscience hesitates to make oath to any fact which the pleader puts in a complaint. The remedy now contended for, by applying to cases embraced within the rule, the presumption of co-citizenship of the corporation and its members, would be just, reasonable and effective. The rule has sometimes been called by the bar "jurisdictional." It will not bear that construction, because that would imply that this Court had exceeded its power. It is jurisdictional only so far that a Circuit Court may well dismiss a bill for non-compliance with the rule as a rule of practice. These remarks are called for by the contention of appellant's counsel. We do not contend that the bill does not allege compliance with the rule in this case.

In *Davenport v. Dows*, 18 Wall. 626, Dows, a citizen of New York, on behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island Pacific Railroad Company, filed a bill against the City of Davenport, to stay the collection of a tax alleged to be illegal. The corporation was not made a party

defendant, and a demurrer was interposed, which was overruled. On appeal to this Court the decree was reversed, Mr. Justice Davis saying:

> "That a stockholder may bring a suit when "a corporation refuses is settled in Dodge v. "Woolsey (18 How., 340), *but such a suit "can only be maintained on the ground that "the rights of the corporation are involved.* "These rights the individual shareholder is "allowed to assert in behalf of himself and "associates, because the directors of the cor- "poration decline to take the proper steps to "assert them. Manifestly the proceedings "for this purpose should be so conducted that "any decree which shall be made on the "merits shall conclude the corporation. This "can only be done by making the corporation "a party defendant. *The relief asked is on "behalf of the corporation, not the individual "shareholder, and if it be granted the com- "plainant derives only an incidental benefit "from it. It would be wrong, in case the "shareholder were successful, to allow the "corporation to renew the litigation in an- "other suit, involving precisely the same sub- "ject matter.* To avoid such a result, a court "of equity will not take cognizance of a bill "brought to settle a question in which the "corporation is the essential party in inter- "est, unless it is made a party to the litiga- "tion."

A case directly in point, on the proposition involved in the present appeal, is *Arapahoe County v. Kansas Pacific Railway Co.*, 4 Dillon, 277; s. c., 1 Fed. Cas., 1080, decided by Mr. Justice Miller, who was then a member of this Court. The action was brought by the plaintiff, a citizen of Colorado, who filed a stockholder's bill in the State Court of Colo-

rado, making the Denver Pacific Railway Company, of which it was a stockholder and which was incorporated under the laws of Colorado, and also its directors, as well as the Kansas Pacific Railway Company, a citizen of Kansas, defendants. The Kansas Pacific Railway Company and the individual defendants, applied to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875, and it was held that the suit was removable, on the ground that the Denver Pacific Railway Company, *although a defendant, was to be treated as a complainant.*

There are three cases upon which complainants may seek to rely in this connection. These cases are as follows, viz.:

Dodge v. Woolsey, 18 How., U. S., 331;
Cotting v. Kansas City Stock Yard Co. and the State of Kansas, 183 U. S., 79; and
Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429.

None of these cases, however, will be found on inspection to militate against the appellees' contention.

In the Dodge case, the Court undoubtedly assumed jurisdiction of a case in which a corporation was sued by one of its stockholders, but the proposition here advanced by the defendants was not presented or considered in any way. Moreover, the question involved in that case was whether a tax, which had been imposed, was in violation of the United States Constitution, and as the existence of a Federal question will confer jurisdiction irrespective of diversity of citizenship, the mere fact that the court actually assumed jurisdiction cannot be

regarded as any authority against appellees' contention herein.

In the case of *Cotting v. Kansas City Stock Yard Co. and the State of Kansas*, 183 U. S., 79, jurisdiction of a litigation between stockholders of a corporation and the corporation, and others, was assumed by the Federal Courts, but the question involved, as in the preceding case, was a constitutional question, being, to use an expression made use of in the opinion at p. 113, simply a challenge to the constitutionality of a statute.

The proposition which counsel here presents does not appear to have been presented to the Court in that case.

In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, a constitutional question was likewise presented, the constitutionality of a certain tax being the issue in the case.

In all of the above cases, as said above, and as the headnotes thereto indicate, constitutional questions were involved, and the citizenship of the respective parties did not, and could not, determine the right of jurisdiction exercised by the Federal Courts. Moreover, the question as to the conclusive presumption that stockholders of a corporation must be deemed residents of the State where the corporation was incorporated was not presented in any way. It is urged by appellants that such presumption is a mere legal fiction, but it has been held, in the cases cited in Point II. herein, to be a presumption of law, irrebuttable and indisputable.

And it would indeed be a singular species of legal legerdermain which would, in the same suit, uphold this legal fiction as to the residence of the complain-

ants when considering the situs or so-called citizenship of the corporation, and then immediately declare the fiction had ceased to exist when the Court came to inquire of what State the complainants were citizens.

Such a course would result in the nullification of what the courts declare to be an indisputable legal presumption, and would be illogical and would give the presumption only half its rightful force.

The question certified should be answered in the negative and the decree of the Circuit Court dismissing the bill affirmed.

GEO. H. YEAMAN,

of Counsel for Appellees.